

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CHRISTOPHER R. YORK,)	
)	No. CV-05-5088-MWL
Plaintiff,)	
)	ORDER GRANTING DEFENDANT'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	
JO ANNE B. BARNHART,)	
Commissioner of Social)	
Security,)	
)	
Defendant.)	

BEFORE THE COURT are cross-motions for summary judgment, noted for hearing without oral argument on April 10, 2006. (Ct. Rec. 12, 15). Plaintiff Christopher York ("Plaintiff") filed a reply brief on April 10, 2006. (Ct. Rec. 17). Attorney D. James Tree represents Plaintiff; Special Assistant United States Attorney Richard M. Rodriguez represents the Commissioner of Social Security ("Commissioner"). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 6). After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS** Defendant's Motion for Summary Judgment (Ct. Rec. 15) and **DENIES** Plaintiff's Motion for Summary Judgment (Ct. Rec. 12).

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1 relevant work consists of work as a cook, fast food worker,
2 telephone sales representative, retail supervisor, book sales
3 person, and hearing aid salesperson. (AR 15, 101, 303-310).

4 At the administrative hearing held on March 24, 2004,
5 Plaintiff testified he attends three classes, four days a week,
6 from 8:00 a.m. to 11:30 a.m., at Columbia Basin Community College.
7 (AR 294-295). He rides a bus to his classes and indicated that he
8 drives to doctor's appointments and to the grocery store, but he
9 has not been issued a handicapped parking permit. (AR 296-297).
10 His last extended trip occurred when he spent about two weeks in
11 Florida to attend a funeral in December of 2003. (AR 296-297).

12 Plaintiff stated that his main problem was the pain resulting
13 from an injury to his big toe on his left foot. (AR 297). In
14 1989, while working as a cook at the Olive Garden, he dropped a
15 lasagna pan on his foot which has since resulted in his current
16 toe problems. (AR 308-309). He testified that if it were not for
17 his toe pain, he would be able to work. (AR 299).

18 Plaintiff described the toe pain as a throbbing pain with
19 swelling and indicated that, when swelled, he could not put much
20 weight on it. (AR 301). He stated that the pain comes and goes,
21 but that he experiences pain about 18 hours a day. (AR 301). On
22 a scale of one to 10, with zero being no pain and 10 being
23 equivalent to having one's hand on fire, Plaintiff indicated that
24 his pain was generally at a seven and, at its worse, a nine. (AR
25 302). He experiences level nine pain about once or twice a week.
26 (AR 302). He stated that, at the time of the administrative
27 hearing, his level of pain was about a five, and he had not taken

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1 any pain medications on the day of the administrative hearing.
2 (AR 303).

3 Plaintiff testified that he could walk around the block a
4 couple of times, stand for about 30 to 45 minutes at a time, and
5 sit for an hour or two. (AR 299-300). He stated that he could
6 sit longer if allowed to prop his leg up to hip height. (AR 300).
7 He indicated that his upper body is strong and he could lift 50 to
8 80 pounds without it being a problem. (AR 300).

9 Plaintiff testified that, on a typical day, he gets up at
10 5:30 a.m. and goes to bed around 11:00 p.m., getting, on average,
11 about six or seven hours of sleep per night. (AR 311). When he
12 wakes up in the morning, he reads the newspaper and watches the
13 morning news, fixes breakfast for his wife and baby if he wakes up
14 before his wife, and then reads or studies for his classes. (AR
15 311-312). He leaves by 7:00 a.m. to get to school by 8:00 a.m.
16 (AR 312). He attends classes until 11:30 a.m. and usually goes to
17 the library thereafter for about an hour to work on homework. (AR
18 312). He arrives at home at around 1:00 p.m. or 1:30 p.m. and
19 prepares to cook dinner and then works on homework until dinner
20 time. (AR 312-313). After dinner, he helps care for the baby and
21 studies and does his homework for the rest of the evening. (AR
22 313).

23 Plaintiff testified that he attends church every Sunday and
24 stated that the two hour service did not cause him trouble because
25 he is sitting during the service. (AR 314). He indicated that he
26 does a lot of things for the church, like baking cakes and pies,
27 but was not a member of any social clubs or organizations. (AR
28 314).

1 At the administrative hearing held on July 22, 2004,
2 Plaintiff testified that he was scheduled to have the pins removed
3 from his toe but that the surgery had been postponed because x-
4 rays revealed that the bone in his toe still had not healed. (AR
5 330-331). He was informed that two additional surgeries were
6 necessary. (AR 331). He stated that he elevates his leg on a
7 regular basis, throughout the day, when he does not have an
8 appointment and is at home. (AR 331-332). He indicated that he
9 elevates his leg for more than half of the day. (AR 332).

10 **SEQUENTIAL EVALUATION PROCESS**

11 The Social Security Act (the "Act") defines "disability" as
12 the "inability to engage in any substantial gainful activity by
13 reason of any medically determinable physical or mental impairment
14 which can be expected to result in death or which has lasted or
15 can be expected to last for a continuous period of not less than
16 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The
17 Act also provides that a Plaintiff shall be determined to be under
18 a disability only if any impairments are of such severity that a
19 Plaintiff is not only unable to do previous work but cannot,
20 considering Plaintiff's age, education and work experiences,
21 engage in any other substantial gainful work which exists in the
22 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).
23 Thus, the definition of disability consists of both medical and
24 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
25 (9th Cir. 2001).

26 The Commissioner has established a five-step sequential
27 evaluation process for determining whether a person is disabled.
28 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person

1 is engaged in substantial gainful activities. If so, benefits are
2 denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If
3 not, the decision maker proceeds to step two, which determines
4 whether Plaintiff has a medically severe impairment or combination
5 of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii),
6 416.920(a)(4)(ii).

7 If Plaintiff does not have a severe impairment or combination
8 of impairments, the disability claim is denied. If the impairment
9 is severe, the evaluation proceeds to the third step, which
10 compares Plaintiff's impairment with a number of listed
11 impairments acknowledged by the Commissioner to be so severe as to
12 preclude substantial gainful activity. 20 C.F.R. §§
13 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P
14 App. 1. If the impairment meets or equals one of the listed
15 impairments, Plaintiff is conclusively presumed to be disabled.
16 If the impairment is not one conclusively presumed to be
17 disabling, the evaluation proceeds to the fourth step, which
18 determines whether the impairment prevents Plaintiff from
19 performing work which was performed in the past. If a Plaintiff
20 is able to perform previous work, that Plaintiff is deemed not
21 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).
22 At this step, Plaintiff's residual functional capacity ("RFC")
23 assessment is considered. If Plaintiff cannot perform this work,
24 the fifth and final step in the process determines whether
25 Plaintiff is able to perform other work in the national economy in
26 view of Plaintiff's residual functional capacity, age, education
27 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
28 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

1 The initial burden of proof rests upon Plaintiff to establish
2 a *prima facie* case of entitlement to disability benefits.
3 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*
4 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
5 met once Plaintiff establishes that a physical or mental
6 impairment prevents the performance of previous work. The burden
7 then shifts, at step five, to the Commissioner to show that (1)
8 Plaintiff can perform other substantial gainful activity and (2) a
9 "significant number of jobs exist in the national economy" which
10 Plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th
11 Cir. 1984).

12 STANDARD OF REVIEW

13 Congress has provided a limited scope of judicial review of a
14 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold
15 the Commissioner's decision, made through an ALJ, when the
16 determination is not based on legal error and is supported by
17 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995
18 (9th Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir.
19 1999). "The [Commissioner's] determination that a plaintiff is
20 not disabled will be upheld if the findings of fact are supported
21 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572
22 (9th Cir. 1983) (*citing* 42 U.S.C. § 405(g)). Substantial evidence
23 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d
24 1112, 1119 n. 10 (9th Cir. 1975), but less than a preponderance.
25 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
26 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
27 573, 576 (9th Cir. 1988). Substantial evidence "means such
28 evidence as a reasonable mind might accept as adequate to support

1 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
2 (citations omitted). "[S]uch inferences and conclusions as the
3 [Commissioner] may reasonably draw from the evidence" will also be
4 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965).
5 On review, the Court considers the record as a whole, not just the
6 evidence supporting the decision of the Commissioner. *Weetman v.*
7 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (quoting *Kornock v.*
8 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

9 It is the role of the trier of fact, not this Court, to
10 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
11 evidence supports more than one rational interpretation, the Court
12 may not substitute its judgment for that of the Commissioner.
13 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
14 (9th Cir. 1984). Nevertheless, a decision supported by
15 substantial evidence will still be set aside if the proper legal
16 standards were not applied in weighing the evidence and making the
17 decision. *Browner v. Secretary of Health and Human Services*, 839
18 F.2d 432, 433 (9th Cir. 1987). Thus, if there is substantial
19 evidence to support the administrative findings, or if there is
20 conflicting evidence that will support a finding of either
21 disability or nondisability, the finding of the Commissioner is
22 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.
23 1987).

24 ALJ'S FINDINGS

25 The ALJ found at step one that Plaintiff has not engaged in
26 substantial gainful activity since the alleged onset date. (AR
27 15). At step two, the ALJ found that Plaintiff has the severe
28 impairments of great toe pain status post fusion, left knee

1 problems, and obesity, but that he does not have an impairment or
2 combination of impairments listed in or medically equal to one of
3 the Listings impairments. (AR 24).

4 The ALJ concluded that Plaintiff has the RFC to perform a
5 wide range of sedentary work. (AR 21). The ALJ found that
6 Plaintiff can lift and/or carry 50 pounds occasionally and 20
7 pounds frequently, standing and walking is limited to at least two
8 hours in an eight-hour workday, sitting or pushing and pulling is
9 not affected by his impairments, he can occasionally climb ramps,
10 stairs, or ladders, he should avoid climbing ropes or scaffolds,
11 he can occasionally engage in balancing, kneeling, crouching,
12 crawling or stooping, and he is limited in exposure to hazards,
13 such as machinery or heights. (AR 21).

14 At step four of the sequential evaluation process, the ALJ
15 found that Plaintiff retains the RFC to perform his past relevant
16 work as a telephone sales representative or hearing aid
17 salesperson.² (AR 22, 23). The ALJ also determined alternatively
18 at step five that, within the framework of the Medical-Vocational
19 Guidelines ("Grids") and based on the vocational expert's
20 testimony and Plaintiff's RFC, age, education, and work
21 experience, there were a significant number of sedentary-level
22 jobs in the national economy which he could perform despite his
23 limitations. (AR 22-23). Examples of such jobs include work as a
24 cashier, in electrical assembly, as a surveillance system monitor,
25

26 ²Although the findings section of the ALJ's opinion states that
27 Plaintiff "is unable to perform any of his past relevant work" (AR 24), this
28 was clearly a typographical or scrivener's error as the body of the ALJ's
decision specifically holds that Plaintiff retains the capacity to perform
his past relevant work as a telephone sales representative and a hearing aid
salesperson (AR 22, 23).

1 as a document preparer, and as a telephone solicitor. (AR 23).
2 Accordingly, the ALJ determined at step four of the sequential
3 evaluation process, and alternatively at step five, that Plaintiff
4 was not disabled within the meaning of the Social Security Act.
5 (AR 22-23).

6 ISSUES

7 Plaintiff contends that the Commissioner erred as a matter of
8 law. Specifically, he argues that:

9 1. The ALJ improperly rejecting the medical opinion of
10 treating physician Darian Van Gorkum, D.P.M.; and

11 2. The ALJ erred at step five of the sequential evaluation
12 process by concluding that Plaintiff could perform work despite
13 the limitations assessed by Dr. Van Gorkum.

14 This Court must uphold the Commissioner's determination that
15 Plaintiff is not disabled if the Commissioner applied the proper
16 legal standards and there is substantial evidence in the record as
17 a whole to support the decision.

18 DISCUSSION

19 **A. Physical RFC**

20 Plaintiff contends that the ALJ erred by not including in his
21 RFC determination that Plaintiff needed to elevate his foot on a
22 daily basis for approximately half the day. (Ct. Rec. 13, pp. 12-
23 14). Plaintiff specifically asserts that the ALJ failed to
24 provide clear and convincing reasons for rejecting the medical
25 opinion of treating physician Darian Van Gorkum, D.P.M., in this
26 regard. (Ct. Rec. 13, pp. 16-18). The Commissioner responds that

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1 the ALJ properly evaluated the medical evidence of record and
2 properly assessed Plaintiff's RFC in this case. (Ct. Rec. 16, pp.
3 8-18).

4 The courts distinguish among the opinions of three types of
5 physicians: treating physicians, physicians who examine but do
6 not treat the claimant (examining physicians) and those who
7 neither examine nor treat the claimant (nonexamining physicians).
8 *Lester v. Chater*, 81 F.3d 821, 839 (9th Cir. 1996). A treating
9 physician's opinion is given special weight because of his
10 familiarity with the claimant and his physical condition. *Fair v.*
11 *Bowen*, 885 F.2d 597, 604-05 (9th Cir. 1989). Thus, more weight is
12 given to a treating physician than an examining physician.
13 *Lester*, 81 F.3d at 830. However, the treating physician's opinion
14 is not "necessarily conclusive as to either a physical condition
15 or the ultimate issue of disability." *Magallanes v. Bowen*, 881
16 F.2d 7474, 751 (9th Cir. 1989) (citations omitted).

17 The Ninth Circuit has held that "[t]he opinion of a
18 nonexamining physician cannot by itself constitute substantial
19 evidence that justifies the rejection of the opinion of either an
20 examining physician or a treating physician." *Lester*, 81 F.3d at
21 830. Rather, an ALJ's decision to reject the opinion of a
22 treating or examining physician, may be *based in part* on the
23 testimony of a nonexamining medical advisor. *Magallanes*, 881 F.2d
24 at 751-55; *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995).
25 The ALJ must also have other evidence to support the decision such
26 as laboratory test results, contrary reports from examining

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1 physicians, and testimony from the claimant that was inconsistent
2 with the physician's opinion. *Magallanes*, 881 F.2d at 751-52;
3 *Andrews*, 53 F.3d 1042-43.

4 Dr. Van Gorkum, a podiatrist, has treated Plaintiff's foot
5 impairment since January 22, 2002. (AR 221). On January 22,
6 2002, Dr. Van Gorkum noted that Plaintiff reported he was a
7 "pretty active individual" but that activity caused pain in his
8 left big toe. (AR 143). Plaintiff related no history of injury
9 to the big toe joint at that time. (AR 143). Plaintiff opted for
10 the recommended fusion of the MPJ joint versus an implant
11 subsequent to being informed that insurance would not cover the
12 implant. (AR 145-151). On March 18, 2002, one week following the
13 operation, Plaintiff reported the pain was much better and he was
14 able to function. (AR 152). Dr. Van Gorkum indicated that the
15 fusion of the first MPJ was doing well. (AR 152). On March 25,
16 2002, Dr. Van Gorkum noted that stability of the fusion site was
17 good, x-rays showed fixation of fusion site to be intact with good
18 position and alignment and the fusion of the first MPJ was going
19 well. (AR 178). Plaintiff stated that he was doing pretty good
20 and the pain was getting a little better for him. (AR 178). On
21 April 8, 2002, despite Plaintiff reporting that he brought his
22 foot down hard resulting in pain, Dr. Van Gorkum found that there
23 was no displacement of the fusion or change of the fixation and
24 that it was doing fairly well. (AR 179). On April 29, 2002,
25 Plaintiff reported he was able to ambulate well with crutches or
26 walking just on his heel with the walker boot and that he felt he
27 was doing well. (AR 180). Dr. Van Gorkum indicated that the
28 fusion site was doing well. (AR 180).

1 On July 15, 2002, Plaintiff stated that he was doing better,
2 the swelling was getting better and things were improving for him.
3 (AR 181). Dr. Van Gorkum noted swelling within normal limits and
4 indicated that the fusion was doing reasonably well. (AR 181).
5 On July 30, 2002, Dr. Van Gorkum approved the prescription of a
6 cane for up to one year and noted that Plaintiff's prognosis was
7 "good." (AR 182). On August 27, 2002, Plaintiff reported to Dr.
8 Van Gorkum that, despite continued swelling, he was doing better,
9 was active on his feet and had no car and thus walked pretty much
10 everywhere. (AR 183). Dr. Van Gorkum indicated that there was
11 good clinical fusion of the fusion site, the edema was much less
12 and the fusion was doing reasonably well. (AR 183).

13 On October 29, 2002, Plaintiff related that he was able to
14 get around, but that it was painful for him. (AR 185). Dr. Van
15 Gorkum indicated that there was good alignment of the fusion and
16 minimal edema. (AR 185). On January 20, 2003, Plaintiff stated
17 that the fusion was feeling better, but he still could not wear a
18 standard shoe without discomfort. (AR 187). Dr. Van Gorkum
19 indicated that the fusion appeared to have healed well and
20 diagnosed painful postoperative status. (AR 187).

21 On March 5, 2003, over one year following the operation,
22 Plaintiff stated that he was "doing much better," and there was
23 really no swelling. (AR 188). It was noted that Plaintiff was on
24 his feet quite a bit and that this caused him pain. (AR 188).
25 Dr. Van Gorkum opined that the procedure looked good clinically
26 and the last x-ray looked "great with complete trabeculation."
27 (AR 188).

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1 On May 6, 2003, Plaintiff reported that he can get around
2 fairly well, and Dr. Van Gorkum related that "everything looks
3 pretty good." (AR 189). On December 8, 2003, Dr. Van Gorkum
4 noted discomfort in the fusion sited although, clinically, the
5 fusion was good. (AR 220). The plan was to remove the hardware
6 from the toe. (AR 220). On February 24, 2004, Dr. Van Gorkum
7 filled out a medical report which indicated that Plaintiff did not
8 need to lie down during the day, he did not have a physical or
9 mental condition that produced pain, he would be restricted from
10 regular work by the limitation of pain resulting from being on his
11 feet for a full day, and his overall prognosis was good. (AR 221-
12 222).

13 On May 11, 2004, Dr. Van Gorkum noted that Plaintiff had been
14 pretty active lately and that Plaintiff had reported that he needs
15 pain medication once in awhile. (AR 239). Dr. Van Gorkum
16 indicated that the joint appeared to be clinically very solid;
17 however, surprisingly, the x-rays taken on that date revealed a
18 partial radiolucent line at the fusion site. (AR 239). Dr. Van
19 Gorkum stated that the last x-rays did not show a partial
20 radiolucent line, but rather showed good trabeculation and
21 consolidation of the fusion, fixation had not moved or changed, it
22 did not appear to be loosened, and alignment had not changed. (AR
23 239). He opined that Plaintiff must have loosened the fusion site
24 over time with his activity. (AR 239). Dr. Van Gorkum diagnosed
25 non-union/delayed union first MPJ fusion, but did not believe it
26 to be a complete non-union. He felt that there was enough
27 trabeculation across the joint to stabilize it, but indicated he
28 would like to see complete trabeculation across the entire union

1 site. (AR 239). Dr. Van Gorkum stated that the hardware would
2 not be removed at that time. (AR 239).

3 On a check-box form provided by Plaintiff's attorney on July
4 22, 2004, Dr. Van Gorkum marked that Plaintiff needs to elevate
5 his leg to or above hip level, on average, for half of the day.
6 (AR 244). On July 26, 2004, Dr. Van Gorkum noted that Plaintiff's
7 pain was better but he still had swelling and pain in the toe.
8 (AR 245). He instructed Plaintiff to stay off of his feet as much
9 as possible and noted that Plaintiff keeps his foot above his
10 heart level at least 50% of the time. (AR 245).

11 On August 4, 2004, Plaintiff reported he was not staying off
12 of his feet and arrived wearing a normal shoe. (AR 250). Dr. Van
13 Gorkum indicated that Plaintiff was not complaint with being non-
14 weight bearing. (AR 250). A radiolucent line was still visible.
15 (AR 250). On August 25, 2004, Dr. Van Gorkum noted that x-rays
16 revealed a radiolucent line and again indicated that Plaintiff was
17 not being compliant with being non-weight bearing. (AR 249).
18 Non-union across the fusion site was viewed on September 23, 2004,
19 October 22, 2004, and November 24, 2004. (AR 246-248).

20 Although Dr. Van Gorkum marked a check-box form³ provided by
21 Plaintiff's attorney on July 22, 2004, indicating that Plaintiff
22 needed to elevate his leg, on average, for half of the day (AR
23 244), the checkmark on this form does not explain the basis for or
24 describe any significant limitations caused by this "need."
25 Moreover, such a finding, without more, does not necessarily limit
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27 ³A check-box form is entitled to little weight. *Crane v. Shalala*, 76
28 F.3d 251, 253 (9th Cir. 1996) (stating that the ALJ's rejection of a check-off
report that did not contain an explanation of the bases for the conclusions
made was permissible).

1 or restrict work related activities. For example, elevating the
2 leg could occur sporadically; i.e, during normal work breaks and
3 before and after the workday. It is significant to note that
4 Plaintiff testified on July 22, 2004, that he only elevates his
5 leg, throughout the day, when he does not have an appointment and
6 is at home. (AR 331-332).

7 A review of Dr. Van Gorkum's medical records reveals that
8 Plaintiff was quite active and was able to get around fairly well,
9 despite pain. Dr. Van Gorkum's medical reports indicate that, to
10 be compliant with his medical advice, Plaintiff was required to
11 stay off his feet as much as possible and to be non-weight bearing
12 on the first MPJ site. Plaintiff was admittedly non-complaint
13 with this advice. (AR 249-250). Dr. Van Gorkum also opined that
14 Plaintiff would be restricted from regular work by the limitation
15 of pain resulting from being on his feet for a full day. (AR
16 222). These limitations are included in the ALJ's RFC
17 determination which holds that Plaintiff's standing and walking is
18 limited to at least two hours in an eight-hour workday. (AR 21).

19 The ALJ's RFC is further supported by other medical
20 professionals of record. At the administrative hearing held on
21 September 24, 2003, medical expert, Dr. Almquist, reported that
22 there should be no pain associated with a fusion. (AR 16, 261).
23 The medical expert testifying at the March 24, 2004, supplemental
24 hearing, Dr. Newman, concurred with Dr. Almquist that there was no
25 basis for Plaintiff's continued toe pain because a surgically
26 fused joint should not be painful, particularly as the record
27 showed Plaintiff's fusion to be solid. (AR 19, 272-273). Dr.
28 Newman filled out a RFC assessment form indicating that Plaintiff

1 could sit, stand, and/or walk about six hours in an eight-hour
2 workday, occasionally engage in climbing, balancing, or stooping,
3 and occasionally to never engage in kneeling, crouching or
4 crawling, but was otherwise not limited. (AR 225).

5 Following the later submission of recent records from Dr. Van
6 Gorkum, Dr. Nelson filled out a Medical Source Statement of
7 Ability to Do Work-Related Activities (Physical) form concluding
8 that Plaintiff could frequently lift and carry 50 pounds,
9 occasionally lift and carry 20 pounds, stand and/or walk at least
10 two hours in an eight-hour workday, sit and push and pull without
11 restriction, only occasionally climb, balance, kneel, crouch,
12 crawl or stoop, had no limitations with regard to manipulative
13 functions and visual/communicative functions, and should avoid
14 hazards. (AR 240-243).

15 On October 21, 2003, Saleem Khamisani, M.D., examined
16 Plaintiff and opined that Plaintiff should avoid prolonged
17 standing, walking for more than 30 minutes at a time, repetitive
18 climbing and squatting. (AR 217). Dr. Khamisani also filled out
19 a Medical Source Statement of Ability to Do Work-Related
20 Activities (Physical) form concluding that Plaintiff had no
21 limitations on lifting, carrying or sitting, could stand and/or
22 walk at least two hours in an eight-hour workday, was limited in
23 pushing and pulling with the lower extremities, could only
24 occasionally climb, balance, kneel, crouch, crawl or stoop, and
25 had no limitations with regard to manipulative functions,
26 visual/communicative functions and environmental restrictions.
27 (AR 208-211).

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1 All of the medical reports of record, including the findings
2 of Dr. Van Gorkum, support the ALJ's RFC determination that
3 Plaintiff can perform a wide range of sedentary work. (AR 21).
4 The ALJ thoroughly summarized the record (AR 16-21) and,
5 consistent with the findings of all medical sources of record,
6 determined that Plaintiff can lift and/or carry 50 pounds
7 occasionally and 20 pounds frequently, standing and walking is
8 limited to at least two hours in an eight-hour workday, sitting or
9 pushing and pulling is not affected by his impairments, he can
10 occasionally climb ramps, stairs, or ladders, he should avoid
11 climbing ropes or scaffolds, he can occasionally engage in
12 balancing, kneeling, crouching, crawling or stooping, and he is
13 limited in exposure to hazards, such as machinery or heights. (AR
14 21). There is no basis for the ALJ including an additional
15 limitation in his RFC determination that Plaintiff is required to
16 elevate his foot half the day. This restriction is simply not
17 supported by the record evidence. The ALJ's RFC finding is
18 supported by substantial evidence and free of legal error.

19 **B. Ability to Perform Work**

20 Plaintiff asserts that the ALJ erred by concluding that he
21 could perform work despite the limitations assessed by Dr. Van
22 Gorkum. (Ct. Rec. 13, pp. 18-19). Specifically, Plaintiff argues
23 that, when the limitation of the need to elevate his leg on a
24 daily basis was presented in a hypothetical to the vocational
25 expert, the vocational expert indicated that Plaintiff would be
26 unemployable.⁴ (Ct. Rec. 13, pp. 18-19; AR 349-350). Therefore,

27
28 ⁴Vocational expert Tom Moreland testified that if the need to elevate
his leg means that he would need to be in a reclined position, it would be
difficult to perform any job and thus would preclude employment. (AR 350).

1 Plaintiff contends that the ALJ erred by relying on an incomplete
2 hypothetical and that a complete hypothetical, one containing the
3 need to elevate his leg, would have resulted in a finding that
4 there would be no job Plaintiff could perform. (Ct. Rec. 13, pp.
5 18-19; AR 349-350).

6 Based on the fact that the undersigned rejects Plaintiff's
7 argument that the ALJ's RFC determination required an additional
8 limitation, *supra*, Plaintiff's argument regarding the ALJ's
9 finding that he has the ability to perform work also fails.

10 As determined above, the ALJ's RFC finding is supported by
11 substantial evidence and free of legal error. The ALJ did not err
12 by failing to include in his RFC determination that Plaintiff
13 needed to elevate his foot on a daily basis for approximately half
14 the day. *Supra*. The ALJ's hypothetical to the vocational expert
15 was consistent with Plaintiff's functional limitations as
16 determined by the ALJ. (AR 346-349). Since the hypothetical
17 relied upon by the ALJ mirrored the ALJ's appropriate RFC
18 determination, the ALJ did not err by according weight to the
19 vocational expert's testimony in response to the hypothetical to
20 make his conclusions in this case.

21 CONCLUSION

22 Having reviewed the record and the ALJ's conclusions, this
23 Court finds that the ALJ's decision that Plaintiff is able to
24 perform work that exists in significant numbers in the national
25 economy is supported by substantial evidence and free of legal

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1 error. Therefore, Plaintiff is not disabled within the meaning of
2 the Social Security Act. Accordingly,

3 **IT IS ORDERED:**

4 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 12**) is
5 **DENIED.**

6 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 15**) is
7 **GRANTED.**

8 3. The District Court Executive is directed to enter
9 judgment in favor of Defendant, file this Order, provide a copy to
10 counsel for Plaintiff and Defendant, and **CLOSE** this file.

11 IT IS SO ORDERED.

12 **DATED** this 15th day of June, 2006.

13
14 s/Michael W. Leavitt
15 MICHAEL W. LEAVITT
16 UNITED STATES MAGISTRATE JUDGE
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